

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL MAIL ROOM

In the Matter of)
)
Mescalero Apache Telecom, Inc.,)
)
GTE Southwest Incorporated,)
)
and)
)
Valor Telecommunications of New Mexico, LLC)
)
Joint Petition for Waiver of the)
Definition of "Study Area" Contained)
in the Part 36, Appendix-Glossary)
of the Commission's Rules)
)
Mescalero Apache Telecom, Inc.)
)
Waiver of Sections 61.41(c)(2), 69.3(e)(11),)
36.611, and 36.612 of the Commission's Rules)
)

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CC Docket No. 96-45 /

ORDER

Adopted: January 18, 2001

Released: January 18, 2001

By the Chief, Accounting Policy Division:

I. INTRODUCTION

1. In this Order, we grant a request from Mescalero Apache Telecom, Inc. (Mescalero), GTE Southwest Incorporated (GTE), and Valor Telecommunications of New Mexico, LLC (Valor), for a waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of the Commission's rules.¹ This waiver will permit Valor to alter the boundaries of a New Mexico study area it has acquired from GTE so that it can transfer to Mescalero approximately 950 access lines currently served by the Mescalero, Alto, and Ruidoso, New Mexico exchanges. This waiver also will permit Mescalero to establish a new study area in New Mexico for the approximately 950 access lines it intends to acquire from Valor.

2. We also grant Mescalero's request for waiver of sections 61.41(c)(2), 69.3(e)(11),

¹ Mescalero Apache Telecom Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC, Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules, Mescalero Apache Telecom Inc., Related Waivers of Parts 36, 54, 61 and 69 of the Commission's Rules (filed June 30, 2000) (Petition).

36.611, and 36.612 of the Commission's rules.² Waiver of section 61.41(c)(2) will permit Mescalero to operate under rate-of-return regulation after acquiring the 950 Valor access lines that are currently under price-cap regulation. Waiver of section 69.3(e)(11) will permit Mescalero to participate in the National Exchange Carrier Association, Inc. (NECA) common line tariff effective upon the close of this transaction. Waiver of sections 36.611 and 36.612 will allow Mescalero to immediately begin receiving high-cost loop support based upon projected costs, rather than historical costs.

3. In a companion order released today, the Commission grants Mescalero's request for waiver of section 54.305 of the Commission's rules.³ Waiver of section 54.305 of the Commission's rules will enable Mescalero to receive high-cost universal service support based on the average cost of the lines under its ownership, rather than receiving the same per-line levels of high-cost support for which the acquired access lines were eligible prior to their transfer from Valor.

II. STUDY AREA WAIVER

A. Background

4. A study area is a geographic segment of an incumbent local exchange carrier's (LEC's) telephone operations. Generally, a study area corresponds to an incumbent LEC's entire service territory within a state. Thus, incumbent LECs operating in more than one state typically have one study area for each state. The Commission froze all study area boundaries effective November 15, 1984,⁴ and an incumbent LEC must apply to the Commission for a waiver of the study area boundary freeze if it wishes to sell or purchase additional exchanges.

5. On June 30, 2000, Mescalero, GTE, and Valor filed a joint petition for waiver of the definition of "study area" contained in the Part 36 Appendix-Glossary of the Commission's rules.⁵ The

² See C.F.R. §§ 36.611, 36.612, 61.41(c)(2), 69.3(e)(11). We note that, as a "successor or assign" of Valor, Mescalero is an incumbent local exchange carrier (LEC), as defined by section 251(h)(1) of the Telecommunications Act of 1996 (1996 Act), and, therefore, does not need a waiver of the statutory definition of incumbent LEC in order to qualify for universal service support based on its own costs. See 47 U.S.C. § 251(h)(1); see also 47 C.F.R. §§ 36.611, 54.301, 54.303. See Petition at 10 n.25. The New Mexico Public Regulation Commission has designated Mescalero as an Eligible Telecommunications Carrier. See *Application of Mescalero Apache Telecom, Inc. for Certificates of Financial and Technical Competency, Operating Authority, and Public Convenience and Necessity and for Approval of Initial Tariffs*, Utility Case No. 3364, Final Order, at 25-28 (N.M. Pub. Reg. Com. rel. Aug. 15, 2000) (*New Mexico Certification Order*).

³ See *Mescalero Apache Telecom, Inc., Waiver of Section 54.305 of the Commission's Rules*, CC Docket No. 96-45, Order, FCC 01-13 (rel. Jan. 18, 2001) (*54.305 Waiver Order*). See also 47 C.F.R. § 54.305. Section 54.305 of the Commission's rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible for prior to their transfer.

⁴ 47 C.F.R. § 36 app. (defining "study area"). See *MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board*, CC Docket Nos. 78-72, 80-286, Recommended Decision and Order, 49 Fed. Reg. 48325 (1984) (*Joint Board Recommended Decision*); Decision and Order, 50 Fed. Reg. 939 (1985) (*1985 Order Adopting Recommendation*); see also *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Notice of Proposed Rulemaking, 5 FCC Rcd 5974 (1990).

⁵ See Petition at 7.

requested waiver would permit Valor to alter the boundaries of a New Mexico study area it has acquired from GTE to transfer to Mescalero approximately 950 access lines currently served by the Mescalero, Alto, and Ruidoso exchanges. The waiver also would permit Mescalero to establish a new study area in New Mexico for the approximately 950 access lines it intends to acquire from Valor. On August 10, 2000, the Common Carrier Bureau (Bureau) released a public notice seeking comment on the petition.⁶ The Salt River Pima-Maricopa Indian Community and Saddleback Communications submitted comments in support of Mescalero's petition.

B. Discussion

6. We find that good cause exists to waive the definition of study area contained in Part 36 Appendix-Glossary of the Commission's rules to permit Valor to remove the 950 access lines from its New Mexico study area, and permit Mescalero to create a new study area for the acquired access lines.

7. Generally, Commission rules may be waived for good cause shown.⁷ As noted by the Court of Appeals for the D.C. Circuit, however, agency rules are presumed valid.⁸ The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest.⁹ In addition, the Commission may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹⁰ Waiver of the Commission's rules is therefore appropriate only if special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest. In evaluating petitions seeking a waiver of the rule freezing study area boundaries, we traditionally have applied a three-prong standard: (1) the change in study area boundaries must not adversely affect the universal service fund; (2) no state commission having regulatory authority over the transferred exchanges may oppose the transfer; and (3) the transfer must be in the public interest.¹¹ For the reasons discussed below, we find that good cause exists to waive the definition of study area contained in Part 36 Appendix-Glossary of the Commission's rules to permit Valor to remove the 950 access lines from its New Mexico study area, and permit Mescalero to create a new study area for the acquired access lines.

8. First, we conclude that the proposed changes in the study area boundaries will not adversely affect any of the universal service mechanisms. Because, under section 54.305 of the Commission's rules, a carrier purchasing high-cost exchanges from an unaffiliated carrier can only receive the same level of per-line support that the selling company was receiving for those exchanges prior to the sale, there can, by definition, be no adverse impact on the universal service fund resulting

⁶ *Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC Seek Waiver of the Definition of "Study Area" in Part 36 and a Waiver of Various of the Commission's Rules*, Public Notice, DA 00-1824 (rel. Aug. 10, 2000).

⁷ 47 C.F.R. § 1.3.

⁸ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

⁹ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹⁰ *WAIT Radio*, 418 F.2d at 1159; *Northeast Cellular*, 897 F.2d at 1166.

¹¹ See, e.g., *US WEST Communications, Inc., and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix-Glossary of the Commission's Rules*, AAD 94-27, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1772 (1995) (*PTI/Eagle Order*).

from this transaction.¹² We note, however, that, in this instance, the Commission has concluded that special circumstances warrant a waiver of section 54.305, and such a waiver will serve the public interest.¹³ Specifically, the Commission has concluded that the proposed transaction will have a minimal effect the high-cost universal service mechanisms because it will not result in an annual aggregate shift in support in an amount equal to or greater than one percent of any high-cost universal service mechanism.¹⁴ We also note that because Mescalero will not be a price cap LEC,¹⁵ it will not be eligible to receive interstate access universal service support for the acquired exchange.¹⁶ We, therefore, conclude that this transaction will not adversely affect the universal service mechanisms.

9. Second, no state commission with regulatory authority over the transferred exchanges opposes the transfer. The New Mexico Public Regulation Commission (New Mexico Commission) has stated that it “strongly endorses, supports, and encourages” grant of Mescalero’s study area waiver request.¹⁷

10. Finally, we conclude that the public interest is served by a waiver of the study area freeze rule to permit Valor to remove 950 access lines from its New Mexico study area and Mescalero to create a new study area for the transferred access lines. In its petition, Mescalero states that grant of the requested waivers will enable it to provide “vastly improved telecommunications services without requiring significant increases in basic service rates.”¹⁸ Mescalero states that it intends to install state-of-the-art digital switching, microwave, and fiber optics facilities.¹⁹ Mescalero also states that it intends to extend lines to previously unserved and underserved residents in remote locations on the Mescalero Apache Reservation, without imposing line extension charges.²⁰ In fact, Mescalero has “committed to the provision of services to all unserved residences in the first two years of its operations.”²¹ The New Mexico Commission reports that the percentage of Mescalero Apache tribal households in Mescalero,

¹² See 47 C.F.R. § 54.503. Section 54.305 of the Commission’s rules provides that a carrier acquiring exchanges from an unaffiliated carrier shall receive the same per-line levels of high-cost universal service support for which the acquired exchanges were eligible prior to their transfer.

¹³ See *54.305 Waiver Order* at paras. 6-13.

¹⁴ *Id.* at para. 12.

¹⁵ See *infra* discussion at paras. 15-18.

¹⁶ Section 54.801 of the Commission’s rules states that, if “all or a portion of a study area served by a price cap LEC is sold to an entity other than a price cap LEC, . . . then the support that would otherwise be provided under this subpart, had such study area or portion thereof not been sold, will not be distributed or collected.” 47 C.F.R. § 54.801(b).

¹⁷ See Petition at 10, Exhibit C; see also *New Mexico Certification Order* at 29.

¹⁸ Petition at 5.

¹⁹ *Id.* at 5-6, 10-11.

²⁰ *Id.* at 5.

²¹ See Letter from James A. Casey, Attorney for Mescalero Apache Telecom, Inc. to Magalie Roman Salas, FCC, dated December 4, 2000, at 3-4 (Mescalero *ex parte*).

New Mexico owning telephones currently is approximately 46 percent.²² We also note that the New Mexico Commission found that Mescalero has the financial and technical qualifications to provide services to the 950 access lines.²³ Based on these representations and the findings of the New Mexico Commission, we conclude that Mescalero has demonstrated that grant of this waiver request serves the public interest.

III. WAIVER OF THE COMMISSION'S PRICE CAP RULES

A. Background

11. Section 61.41(c)(2) of the Commission's rules provides that a non-price cap carrier that acquires access lines from a price cap carrier shall become subject to price cap regulation and must file price cap tariffs within a year.²⁴ Under this rule, Mescalero's acquisition of exchanges from Valor would subject Mescalero to price cap regulation.

12. In the *LEC Price Cap Reconsideration Order*, the Commission explained that section 61.41(c), the "all-or-nothing" rule, is intended to address two concerns regarding mergers and acquisitions involving price cap companies.²⁵ The first concern was that, in the absence of the rule, a LEC might attempt to shift costs from its price cap affiliate to its non-price cap affiliate, allowing the non-price cap affiliate to charge higher rates to recover its increased revenue requirement, while increasing the earnings of the price cap affiliate. The second concern was that, absent the rule, a LEC might attempt to game the system by switching back and forth between rate-of-return regulation and price cap regulation. For example, a price cap company may attempt to "game" the system by opting out of price cap regulation, building a large rate base under rate-of-return regulation so as to raise rates and then, after returning to price caps, cutting costs back to an efficient level, thereby enabling it to realize greater profits. It would not serve the public interest, the Commission stated, to allow a carrier alternately to "fatten up" under rate-of-return regulation and "slim down" under price cap regulation, because the rates would not decrease in the manner intended under price cap regulation.²⁶

13. The Commission nonetheless recognized in the *LEC Price Cap Reconsideration Order*

²² See *New Mexico Certification Order* at 2.

²³ See *id.* at 14-19.

²⁴ 47 C.F.R. § 61.41(c)(2). See *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6821 (1990) (*Price Cap Order*), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order*), *aff'd sub nom. National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993), *petitions for further recon. dismissed*, 6 FCC Rcd 7482 (1991), *further modification on recon.*, *Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991), *further recon.*, Memorandum Opinion and Order on Second Further Reconsideration, 7 FCC Rcd 5235 (1992). Moreover, section 61.41(d) provides that LECs that become subject to price cap regulation are not permitted to withdraw from such regulation. 47 C.F.R. § 61.41(d).

²⁵ See *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

²⁶ *Id.*

that narrow waivers of the price cap “all-or-nothing” rule might be justified if efficiencies created by the purchase and sale of exchanges outweigh the threat that the system might be subject to gaming.²⁷ Waivers of section 61.41(c)(2) will be granted conditioned on the selling price cap company’s downward adjustment to its price cap indices to reflect the sale of exchanges.²⁸ The Commission explained that such an adjustment is needed to remove the effects of transferred exchanges from rates that have been based, in whole or in part, upon the inclusion of those exchanges in a carrier’s price cap indices.²⁹ In addition, waivers of the all-or-nothing rule have been granted subject to the condition that the acquiring carrier obtain prior Commission approval of any attempt to return to price cap regulation.³⁰

14. Mescalero intends to operate under rate-of-return regulation, while Valor is subject to price cap regulation. Mescalero seeks a waiver of section 61.41(c)(2) of the Commission’s rules to permit it to operate under rate-of-return regulation after acquiring from Valor 950 access lines that are currently under price cap regulation. Mescalero states that application of this rule will not serve the purpose of the rule, which is to prevent LECs from shifting costs between price cap and non-price cap affiliates and from increasing rates by switching back and forth between rate-of-return regulation and price cap regulation.³¹ Absent a waiver of section 61.41(c)(2), all of Mescalero’s operations would become subject to price cap regulation no later than one year after acquiring the price cap access lines from Valor.

B. Discussion

15. For the reasons discussed below, we find that good cause exists for us to waive section 61.41(c)(2) of the Commission’s rules, and that it would be in the public interest to grant Mescalero’s waiver request. As discussed previously, the courts have interpreted section 1.3 of the Commission’s rules to require a petitioner seeking a waiver of a Commission rule to demonstrate that special circumstances warrant a deviation from the general rule, and that such a deviation will serve the public interest.³²

16. Because Mescalero is significantly smaller than any of the carriers subject to mandatory price cap regulation, we find that special circumstances support a waiver of section 61.41(c)(2). In

²⁷ *Id.* at 2706 n. 207.

²⁸ See *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961, 9104-06 (1995) (*LEC Price Cap Review Order*). The Price Cap Indices, which are the upper bounds for rates that comply with price cap regulation, are calculated pursuant to a formula specified in the Commission’s rules for price cap carriers. See 47 C.F.R. § 61.45.

²⁹ See *LEC Price Cap Review Order*, 10 FCC Rcd at 9105-9106.

³⁰ See, e.g., *Rye Telephone Company, Inc. and US WEST Communications, Inc., Joint Petition for Waiver of Definition of “Study Area” Contained in the Part 36 Appendix-Glossary of the Commission’s Rules and Petition for Waiver of Section 61.41(c)(2) of the Commission’s Rules*, CC Docket No. 96-45, Order, DA 00-1585, at para. 17 (Acc. Pol. Div. rel. Jul. 18, 2000); *ALLTEL Corp. Petition for Waiver of Section 61.41 of the Commission’s Rules and Application for Transfer of Control*, CCB/CPD No. 99-1, Memorandum Opinion and Order, 14 FCC Rcd. 14191, 14202 (1999) (*ALLTEL/Aliant Merger Order*).

³¹ See Petition at 17.

³² See *supra* discussion at para. 7.

evaluating requests for waiver of section 61.41(c)(2), the Bureau has taken into account the company's preferences and, in particular, the preferences of small carriers.³³ In fact, the Commission traditionally has been sensitive to the unique administrative burdens imposed on small telephone companies by the application of its rules.³⁴ In the *LEC Price Cap Order*, the Commission decided that small telephone companies would not be required to operate under a regulatory regime that was designed largely on the basis of the historical performance of the largest LECs.³⁵ The Commission explained that small and mid-size LECs may have fewer opportunities than large companies to achieve cost savings and efficiencies and may be less productive than the seven Regional Bell Operating Companies (RBOCs) and GTE.³⁶ The Commission, therefore, limited the mandatory application of price cap regulation to the eight largest LECs -- the seven RBOCs and GTE.

17. Mescalero has expressed a preference for operating under rate-of-return regulation.³⁷ After the proposed transaction, Mescalero, which is a newly-formed company and will begin operations upon acquisition of the 950 access lines, will be far smaller than any of the LECs subject to mandatory price caps, and also will be significantly smaller than many other carriers that have been granted waivers of section 61.41(c)(2) of the Commission's rules.³⁸ Therefore, we find that Mescalero presents special circumstances to support its waiver request.

18. We also conclude that, in this case, waiver of section 61.41(c)(2) of the Commission's rules will serve the public interest. We agree with Mescalero that the circumstances surrounding Mescalero's acquisition of Valor's access lines fail to give rise to the dangers of cost-shifting and gaming of the system.³⁹ Mescalero is not seeking to maintain separate affiliates under different systems of regulation, and, therefore, Mescalero will have no opportunity to shift costs between price-cap and rate-of-return affiliates.⁴⁰ Moreover, to safeguard against possible gaming that could result from attempts to elect price-cap regulation at a later time, we will require Mescalero to seek prior Commission

³³ See, e.g., *ALLTEL/Aliant Merger Order*, 14 FCC Rcd at 14204-05.

³⁴ See, e.g., *id.* at 14204; *In the Matter of Minburn Telecommunications, Inc., Petition for Waiver of Sections 61.41(c) and (d) of the Commission's Rules*, CCB/CPD No. 99-16, Memorandum Opinion and Order, 14 FCC Rcd 14184, 14187 (Com. Car. Bur. 1999).

³⁵ See *Price Cap Order*, 5 FCC Rcd at 6799-6801, 6818-19.

³⁶ *Id.*

³⁷ Petition at 17-19.

³⁸ See, e.g., *CenturyTel of Northwest Arkansas, LLC et al., Joint Petition for Waiver of Definition of "Study Area" Contained in the Part 36 Appendix-Glossary of the Commission's Rules, Petition for Waiver of Sections 61.41(c) and 69.3(g)(2) of the Commission's Rules*, CC Docket No. 96-45, Memorandum Opinion and Order, DA 00-1434 (Acc. Pol. Div. rel. June 27, 2000) (approving the conversion of 214,270 access lines from price cap to rate-of-return regulation); *ALLTEL/Aliant Merger Order* (approving the conversion of approximately 300,000 access lines from price cap to rate-of-return regulation); *In the Matter of ALLTEL Service Corporation, Petition for Waiver of Section 61.41 of the Commission's Rules*, Order, 8 FCC Rcd 7054 (Com. Car. Bur. 1993) (approving the conversion of approximately 285,000 access lines from price cap to rate-of-return regulation).

³⁹ See Petition at 18.

⁴⁰ *Id.*

approval if it seeks to elect price-cap regulation. At that time, we can make a determination if the transaction raises concerns that we sought to address in section 61.41(c)(2). We believe that requiring Mescalero to seek Commission approval before electing price-cap regulation is sufficient to deter gaming in the future.

19. In accordance with section 61.45 of the Commission's rules, we also require Valor to adjust its price cap indices to reflect the removal of the transferred access lines from its New Mexico study area.⁴¹ Section 61.45 grants us discretion to require price cap carriers to make adjustments to their price cap indices to reflect cost changes resulting from rule waivers.⁴² We require Valor to make such an adjustment.⁴³

IV. WAIVER OF SECTION 69.3(e)(11)

A. Background

20. Under section 69.3(e)(11) of the Commission's rules, any change in NECA carrier common line tariff participation and long term support (LTS) resulting from a merger or acquisition of telephone properties is effective on the next annual access tariff filing effective date following the merger or acquisition.⁴⁴ Section 69.3(e)(11) of the Commission's rules was implemented to minimize the complexity of administering the LTS program.⁴⁵ Because the next annual access tariff filing effective date is not until July 1, 2001,⁴⁶ Mescalero would be required to file its own interstate tariffs for the acquired access lines until July 1, 2001. In order to avoid the burdens associated with filing its own tariff, Mescalero has requested a waiver of section 69.3(e)(11) of the Commission's rules to enable the acquired access lines to participate in the NECA carrier common line tariff upon the date of the closing of the transaction.⁴⁷

⁴¹ See 47 C.F.R. § 61.45(d). The Price Cap Indices, which are the upper bounds for rates that comply with price cap regulation, are calculated pursuant to a formula specified in the Commission's rules for price cap carriers. See also *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, First Report and Order, 10 FCC Rcd 8961 (1995).

⁴² See 47 C.F.R. § 61.45(d).

⁴³ The Bureau has required carriers to make adjustments to their price cap indices in past study area waivers involving the sale of exchanges operated by carriers subject to price cap regulation. See, e.g., *Sully Buttes Telephone Cooperative, Inc. and U S WEST Communications, Inc., Joint Petition for Waiver of the Definition of "Study Area" Contained in Part 36, Appendix (Glossary) of the Commission's Rules and Petition for Waiver of Section 61.41(c) and (d) and 69.3(e)(11) of the Commission's Rules*, CC Docket No. 96-45, Order, DA 00-1894 (Acc. Pol. Div. rel. Aug. 18, 2000).

⁴⁴ 47 C.F.R. § 69.3(e)(11).

⁴⁵ See *Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions*, CC Docket No. 89-2, Report and Order, 5 FCC Rcd 231, 248 (1989) (*Common Line Pool Order*).

⁴⁶ See 47 C.F.R. § 69.3(a).

⁴⁷ Petition at 16-17.

B. Discussion

21. We find that Mescalero has demonstrated that special circumstances warrant a deviation from section 69.3(e)(11) of the Commission's rules and that it would be in the public interest to grant Mescalero's waiver request. First, in this instance, the inclusion of the acquired access lines in the NECA carrier common line tariff represents a minimal increase in NECA common line pool participation and will not unduly increase the complexity of administering the LTS program.⁴⁸ Second, we believe that it would be administratively burdensome for Mescalero, a newly-formed company, to file interstate tariffs for only 950 access lines until July 1, 2001. We therefore believe that Mescalero presents special circumstances to justify waiver of section 69.3(e)(11) of the Commission's rules. Because the inclusion of the acquired access lines in the carrier common line tariff prior to July 1, 2001 will enable Mescalero, a newly-formed, small, tribally-owned telecommunications carrier, to devote greater resources to extending reasonably-priced telecommunications services to unserved portions of the Mescalero Apache Reservation,⁴⁹ we also believe that waiver of section 69.3(e)(11) will be in the public interest. We also note that, according to NECA, "inclusion of the acquired access lines in NECA's tariff, effective on March 1, 2001 . . . , will create no undue administrative burden for NECA, nor will it result in any disadvantage to other tariff participants."⁵⁰ We therefore conclude that there is good cause to grant Mescalero a waiver of section 69.3(e)(11).

V. WAIVER OF SECTIONS 36.611 AND 36.612

A. Background

22. As discussed above, the amount of high-cost loop support a rural company receives under the Commission's rules is based on the relationship of its study area average cost per loop to the nationwide average cost per loop.⁵¹ In accordance with section 36.611 of the Commission's rules, on July 31 of each year, incumbent LECs file the preceding year's loop cost data with NECA.⁵² NECA compiles and analyzes these data to determine the average cost per loop for each incumbent LEC study area as well as the nationwide average cost per loop, adjusted by the indexed cap on the high-cost fund.⁵³

⁴⁸ According to Mescalero, the approximately 950 access lines that Mescalero intends to acquire from Valor would represent an increase of significantly less than one percent of the approximately 10.5 million access lines within the NECA common line pool. Petition at 16 n. 44.

⁴⁹ According to the New Mexico Commission, the percentage of Mescalero Apache tribal households in Mescalero, New Mexico owning telephones is approximately 46 percent. *See New Mexico Certification Order* at 2.

⁵⁰ *See* Letter from James A. Casey, Attorney for Mescalero Apache Telecom, Inc. to Magalie Roman Salas, FCC, dated January 17, 2001, at 2.

filed as an enclosure a Letter from, dated January 17, 2001, at

⁵¹ *See* 47 C.F.R. § 36.631.

⁵² *See* 47 C.F.R. § 36.611.

⁵³ 47 C.F.R. § 36.601(c). In the *First Report and Order*, the Commission retained the indexed cap on the growth of the existing high-cost fund. *First Report and Order*, 12 FCC Rcd at 8940. The indexed cap, originally adopted in 1993, limits the maximum growth in the total amount of support available from the high-cost fund to the previous year's support amount, increased by an index factor that is equal to the rate of growth in the total number (continued....)

Each incumbent LEC's high-cost loop support for the following year is based on the relationship between the incumbent LEC's study area average cost per loop and the nationwide average cost per loop, as limited by the indexed cap.

23. Because under section 36.611 of the Commission's rules the cost data are not submitted by carriers until seven months after the end of a calendar year, and because NECA requires time to analyze the data and make the necessary nationwide calculations of support by determining the nationwide average loop cost adjusted by the indexed cap, carriers generally do not receive high-cost loop support based on these data until the beginning of the second calendar year after the costs are incurred.⁵⁴ As a result, carriers without historical data, such as newly-established carriers, must wait for up to two years before receiving any high-cost loop support payments. Under section 36.612 of the rules, carriers can, however, update their data on a quarterly basis, and receive support earlier than the beginning of the second calendar year after incurring the costs.⁵⁵ That section allows carriers to update, on a quarterly basis, the calendar year cost data that they submit to NECA on July 31. If a carrier files a quarterly update, by September 30, for instance, NECA recalculates high-cost loop support for all carriers based in part on that carrier's updated data (e.g., cost data covering the last nine months of the previous calendar year and the first three months of the current calendar year, as well as its loop costs), rather than the calendar year data submitted on July 31. Thus, the quarterly update provision allows carriers to receive support based on updated cost and loop count information much earlier than the beginning of the second calendar year after costs are incurred.

24. Mescalero requests waiver of sections 36.611 and 36.612 of the Commission's rules to enable it to receive high-cost loop support payments immediately upon commencement of operations.⁵⁶ Mescalero states that grant of the requested waivers will enable it to extend reasonably-priced telecommunications services to all previously unserved residential customers on the Reservation that are located in rural, remote, and high-cost areas on the Reservation,⁵⁷ without imposing line extension charges.⁵⁸ Mescalero has committed to extend service to all unserved residences on the Reservation in the first two years of its operations.⁵⁹ According to Mescalero, the "Reservation has 1,025 residences,

(Continued from previous page) _____

of working loops nationwide for the preceding calendar year. The indexed cap, however, does not apply in those years where the rate of growth in working loops nationwide has exceeded the growth in the nationwide average cost per loop. *See Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge*, Fourth Order on Reconsideration in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318, 5336-37 (1997).

⁵⁴ See 47 C.F.R. § 36.612

⁵⁵ See 47 C.F.R. § 36.612.

⁵⁶ See Petition at 12-15.

⁵⁷ See Mescalero *ex parte* at 2; Petition at 2. Mescalero notes that its service area will be the Reservation, which encompasses approximately 463,000 acres of land in the northeast portion of Otero County in southern New Mexico.

⁵⁸ *Id.* at 6-7.

⁵⁹ See Mescalero *ex parte* at 3-4.

537 (52 percent) of which are without telephone service.”⁶⁰ This is significantly below the national average penetration rate of 94.6 percent of all households in the United States.⁶¹ Moreover, Mescalero explains that existing facilities, which are antiquated and in poor condition, have reached capacity and cannot be expanded to serve the currently unserved areas of the reservation without first upgrading the system.⁶² In addition, because Mescalero is acquiring partial exchanges, Mescalero immediately will need to install its own switch in order to continue providing services to existing customers.⁶³

25. Because Mescalero does not have historical data with which to compute high-cost loop support, Mescalero proposes to compute high-cost loop support in the initial two years based on its estimated costs per access line.⁶⁴ Mescalero also proposes to “true up” on an annual basis to reconcile any difference between estimated and actual costs incurred.⁶⁵

B. Discussion

26. Because Mescalero predominantly will provide services to remote, rural, and high-cost areas that currently do not have access to basic telephone service, we find that special circumstances warrant a deviation from sections 36.611 and 36.612 of the Commission’s rules and that it would be in the public interest to grant Mescalero’s waiver request. Thus far, we have granted waivers of section 36.611 and 36.612 of the Commission’s rules only in limited circumstances, namely to cover costs incurred by a carrier serving previously unserved areas.⁶⁶ We have found compelling reasons to permit immediate high-cost support for a new company providing service to an unserved area.⁶⁷ We have concluded that denying immediate high-cost loop support could have the unintended effect of discouraging service in unserved remote areas, thereby frustrating our goal of promoting the provision of services at reasonable rates.⁶⁸ We have noted that, because companies seeking to serve previously unserved areas make large capital investments to initiate services without immediate support, their

⁶⁰ See *id.* at 3.

⁶¹ See *Monitoring Report*, September 2000, CC Docket No. 98-202 (rel. Nov. 9, 2000) (*Monitoring Report*). Due to the fact that there can be multiple households per residence, a measure reflecting penetration of 48 percent of the residences will be equal to or less than a 48 percent penetration rate based on households.

⁶² See *Mescalero ex parte* at 3; Petition at 6.

⁶³ See *New Mexico Certification Order* at 15.

⁶⁴ Petition at 15.

⁶⁵ *Id.*

⁶⁶ See *Border to Border Communications, Inc., Petition for Waiver of Sections 36.611 and 36.612 of the Commission’s Rules*, AAD 94-61, Memorandum Opinion and Order, 10 FCC Rcd 5055 (Com. Car. Bur. 1995) (*Border to Border*); *South Park Telephone Company, Petition for Waiver of Section 36.611 and 36.612 of the Commission’s Rules*, AAD 97-41, Order, 13 FCC Rcd 198 (Acct. & Audits Div. 1997) (*South Park*); *Sandwich Isles Communications, Inc., Petition for Waiver of Section 36.611 of the Communications Rules and Request for Clarification*, AAD 97-82, Order, 13 FCC Rcd 2407 (Acct. & Audits Div. 1998) (*Sandwich Isles*).

⁶⁷ See *South Park*, 13 FCC Rcd at 201-22.

⁶⁸ *Id.*; *Border to Border*, 10 FCC Rcd at 5057.

company-specific rates would likely be extremely high.⁶⁹ In short, such areas would have likely remained unserved if these carriers were unable to provide service.⁷⁰

27. We find that Mescalero has demonstrated that special circumstances warrant waivers of sections 36.611 and 36.612 of the Commission's rules. Mescalero, a wholly-owned and operated tribal carrier, is a newly-formed company established to address the severe shortage of telecommunications services on the Reservation.⁷¹ Denial of immediate high-cost loop support could have the unintended effect of discouraging Mescalero's planned expansion of service to unserved remote areas, thereby frustrating the Commission's goal of promoting the provision of telecommunications services at reasonable rates.⁷² We note that a majority of the residences on the Reservation "are without telephone service."⁷³ As discussed above, this is significantly below the national average penetration rate of 94.6 percent of all households in the United States.⁷⁴ We also note that Mescalero projects that its single largest source of funds for extending services to unserved residences will be high-cost loop support.⁷⁵ As discussed above, Mescalero also will need to install its own switch in order to provide services to the acquired access lines.⁷⁶ Moreover, according to Mescalero, "existing facilities have reached capacity and cannot be expanded to serve the currently unserved areas of the Reservation without first upgrading the system."⁷⁷ Taken together, these facts demonstrate that, without immediate access to high-cost loop support, Mescalero's planned deployment of services to all unserved residences on the Mescalero Apache Reservation may be delayed for at least two years.⁷⁸ As we have concluded in prior orders granting requests for waiver of sections 36.611 and 36.612 of the Commission's rules, such an outcome could frustrate the Commission's goal of promoting the provision of services in unserved areas at reasonable rates.⁷⁹

28. We also conclude that it would be in the public interest to grant Mescalero's waiver request. As discussed above, Mescalero has committed to providing service to all unserved residences in the first

⁶⁹ See *South Park*, 13 FCC Rcd at 202.

⁷⁰ See *Sandwich Isles*, 13 FCC Rcd at 2411.

⁷¹ See *Mescalero ex parte* at 3.

⁷² See *South Park*, 13 FCC Rcd at 201-22; *Border to Border*, 10 FCC Rcd at 5057.

⁷³ See *Mescalero ex parte* at 3. According to the New Mexico Commission, the percentage of Mescalero Apache tribal households in Mescalero, New Mexico owning telephones is approximately 46 percent. See *New Mexico Certification Order* at 2.

⁷⁴ See *supra* discussion at para. 25.

⁷⁵ See *Petition* at Exhibit B, Schedule 3; see also *New Mexico Certification Order* at 16-17.

⁷⁶ See *id.* at 15.

⁷⁷ See *Mescalero ex parte* at 3.

⁷⁸ See *Petition* at 13-15. See also *New Mexico Certification Order* at 16 ("the denial of the USF waivers sought by [Mescalero] would delay the build out of the project by two years").

⁷⁹ See *supra* discussion at para. 27.

two years of operation using universal service support to achieve that goal.⁸⁰ Waiver of sections 36.611 and 36.612 of the Commission's rules in this instance will enable Mescalero to immediately begin increasing access to telecommunications services on the Reservation consistent with the Commission's statutory goal of preserving and advancing universal service.⁸¹ Such a waiver also is consistent with the Commission's mandate to ensure that consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high-cost areas, have access to telecommunications and information services.⁸²

29. We also find that this result is consistent with our obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance and to ensure a standard of livability for members of Indian tribes on tribal lands.⁸³ The grant of this waiver will enhance the Mescalero Apache tribe's access to telecommunications, including access to interexchange services, advanced telecommunications, and information services, and thereby increase the tribe's access to education, commerce, government, and public services. These measures will also help bridge the physical distances between those living on the Reservation and the emergency, medical, employment, and other services that they may need to improve the standard of living on the Reservation.⁸⁴ Accordingly, we conclude that Mescalero has demonstrated that the grant of this waiver request serves the public interest.

30. Therefore, we grant Mescalero a waiver of sections 36.611 and 36.612 of the Commission's rules to the extent necessary to permit it to receive high-cost loop support for the period January 1, 2001 through December 31, 2002 based initially on projected costs followed by quarterly true-ups using actual costs.⁸⁵ We direct Mescalero to submit quarterly updates of its actual costs in accordance with the Commission's rules,⁸⁶ so that it may be determined whether adjustments for the

⁸⁰ See Mescalero *ex parte* at 3-4. Specifically, Mescalero commits to provide service to 248 unserved residences in the communities of Pena, Snow Springs, A&B Hill, Old Ladies Town, Summit, White Mountain Subdivision, New Mescalero School, Old Road, Gallarito Flats, Mud Canyon, and Pigeon Tank in the first year of operation and 289 unserved residences in the Communities of Mescalero Village and Highway 70, Cow Camp, White Tail, Silver Lakes, and Three Rivers in the second year of operations.

⁸¹ See 47 U.S.C. § 254(b).

⁸² *Id.*

⁸³ See *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, FCC 00-208, paras. 22-23, (rel. Jun. 30, 2000) (*Twelfth Report and Order*), stayed in part by *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas*, CC Docket No. 96-45, Order and Further Notice of Proposed Rulemaking, FCC 00-322 (rel. Aug. 31, 2000), as corrected by Errata, CC Docket No. 96-45, DA 00-2128 (Com Car. Bur. rel Sep. 20, 2000).

⁸⁴ See, e.g., *Twelfth Report and Order* at para. 23 (citing, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Association, et al.*, 443 U.S. 658 (1979) (holding that the federal government's unique relationship with Indian tribes may create a federal duty to ensure that federal regulation of tribal lands assures "Indians with . . . a moderate living"))).

⁸⁵ See *Sandwich Isles*, 13 FCC Rcd at 2411; *South Park*, 13 FCC Rcd at 202.

⁸⁶ See 47 C.F.R. § 36.612.

2001 and 2002 high-cost loop support amounts are necessary. Payments for periods subsequent to December 2002 shall be based on the conventional historic data in accordance with the Commission's rules.

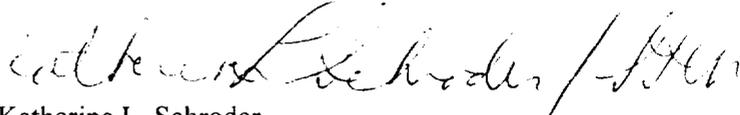
VI. ORDERING CLAUSES

31. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of Part 36, Appendix-Glossary, of the Commission's rules, filed by Mescalero Apache Telecom, Inc., GTE Southwest Incorporated, and Valor Telecommunications of New Mexico, LLC on June 30, 2000, IS GRANTED, as described herein.

32. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, 202, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, 202, and 254, and sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, that the petition for waiver of sections 36.611, 36.612, 61.41(c), and 69.3(e)(11) of the Commission's rules, 47 C.F.R. §§ 36.611, 36.612, 61.41(c), 69.3(e)(11), filed by Mescalero Apache Telecom, Inc., IS GRANTED, as described herein.

33. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i), 5(c), 201, and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 201, and 202, and sections 0.91, 0.291, 1.3, and 61.43 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 1.3, and 61.43, that Valor Telecommunications of New Mexico, LLC SHALL ADJUST its price cap indices in its annual price cap filing to reflect cost changes resulting from this transaction, consistent with this Order.

FEDERAL COMMUNICATIONS COMMISSION



Katherine L. Schroder
Chief, Accounting Policy Division